UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DALMATIA IMPORT GROUP, INC., Plaintiff, v. FOODMATCH, INC. et al., Defendants.	Case No. 1:16-cv-933-GBD

DALMATIA'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR (1) PRELIMINARY INJUNCTION AGAINST FOODMATCH, INC. AND LANCASTER FINE FOODS, INC. FOR TRADEMARK COUNTERFEITING AND TRADEMARK INFRINGEMENT AND (2) EXPEDITED DISCOVERY

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF FACTS 3

I. DALMATIA DEVELOPED AND PROTECTED ITS RENOWNED FIG SPREAD 3

II. DALMATIA SELECTED FOODMATCH AS ITS DISTRIBUTOR 3

III. DALMATIA DISCOVERED QUALITY PROBLEMS IN BATCHES OF FIG SPREAD MANUFACTURED BY LANCASTER 4

IV. DALMATIA REJECTED CERTAIN BATCHES PRODUCED BY LANCASTER AND ULTIMATELY HALTED LANCASTER'S PRODUCTION ENTIRELY 5

V. DALMATIA NOTIFIED FOODMATCH THAT LANCASTER'S INVENTORY HAD BEEN REJECTED 6

VI. LANCASTER SOLD REJECTED AND UNAUTHORIZED DALMATIA PRODUCTS DIRECTLY TO FOODMATCH, WHICH SOLD THOSE COUNTERFEIT PRODUCTS TO WHOLESALERS AND RETAILERS 7

VII. DALMATIA IS SUFFERING IMMENSE IRREPARABLE INJURY 9

ARGUMENT 10

I. PRELIMINARY INJUNCTION STANDARD 10

II. DEFENDANTS ARE INFRINGING DALMATIA'S TRADEMARKS 11

A. Plaintiff owns valid marks for DALMATIA and its jar configuration 11

B. Defendants' unauthorized use of Plaintiff's DALMATIA marks causes a likelihood of confusion 11

III. FOODMATCH AND LANCASTER ARE COUNTERFEITING 15

IV. PLAINTIFF IS SUFFERING IRREPARABLE INJURY 16

V. THE BALANCE OF HARMS FAVORS A PRELIMINARY INJUNCTION 18

VI. A PRELIMINARY INJUNCTION WOULD SERVE THE PUBLIC INTEREST 18

VII. THE COURT SHOULD ORDER A SEIZURE OF, OR COMPEL DEFENDANTS TO DELIVER TO THE COURT OR DALMATIA, THE COUNTERFEIT GOODS AND MEANS OF COUNTERFEITING 19

VIII. THE COURT SHOULD ORDER A RECALL OF COUNTERFEIT GOODS 20

IX. PLAINTIFF SHOULD NOT BE REQUIRED TO POST A BOND, OR, ALTERNATIVELY, ONLY A NOMINAL BOND 22

X. THE COURT SHOULD ORDER EXPEDITED DISCOVERY 23

A. Dalmatia has shown likelihood of success on its trademark and counterfeiting claims and has demonstrated irreparable injury 24

B. Expedited discovery may prevent further irreparable harm 24

C. The harm to Dalmatia if expedited discovery is denied outweighs any harm to FoodMatch and Lancaster 25

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

American ORT, Inc. v. ORT Israel,
No. 07 Civ. 23321, 2009 U.S. Dist. LEXIS 10202 (S.D.N.Y. Jan. 21, 2009)........................22

Arrow Fastener v. Stanley Works,
59 F.3d 384 (2d Cir. 1995)........................11

Ayyash v. Bank Al-Madina,
233 F.R.D. 325 (S.D.N.Y. 2005)........................24

Bear USA v. A.J. Sheepskin & Leather Outerwear,
909 F. Supp. 896 (S.D.N.Y. 1995)........................14

Beharry & Co.,
2006 U.S. Dist. LEXIS 79332 (E.D.N.Y. Oct. 31, 2006)........................15

Behnam Jewelry Corp. v. Aron Basha Corp.,
No. 97-CIV-3841, 1997 U.S. Dist. LEXIS 15957 (S.D.N.Y. July 18, 1997)........................23

Byron Lars v. San Siro, Inc.,
No. 96b Civ. 9499, 1997 U.S. Dist. LEXIS 9398 (S.D.N.Y. May 19, 2007)........................17

C=Holdings B.V. v. Asiaram Corp.,
992 F. Supp. 2d 223 (S.D.N.Y. July 19, 2012)........................15

Cartier v. Aaron Faber, Inc.,
512 F. Supp. 2d 165 (S.D.N.Y. 2007)........................15

Century 21 Real Estate, LLC v. Raritan Bay Realty, Ltd.,
No. CV-07-1455, 2008 U.S. Dist. LEXIS 109507 (E.D.N.Y. July 24, 2008)........................16

Chanel, Inc. v. Conklin Fashions, Inc.,
No. 3:15cv893, 2015 U.S. Dist. LEXIS 109886 (S.D.N.Y. Aug. 14, 2015)........................19

Cherry River Music Co. v. Simitar Ent., Inc.,
38 F. Supp. 2d 310 (S.D.N.Y. 1999)........................20, 21

Church of Scientology Int'l v. The Elmira Mission of the Church of Scientology,
794 F.2d 38 (2d Cir. 1986)........................16, 17, 18

Corning Glass Works v. Jeannette Glass Co.,
308 F. Supp. 1321 (S.D.N.Y. 1970)........................18

Dallas Cowboys Cheerleaders, Inc., v. Pussycat Cinema, Ltd.,
604 F.22d 200, 205 (2d Cir. 1979)....................11

Doctor's Assocs. v. Stuart,
85 F.3d 975 (2d Cir. 1996)....................22

El Greco Leather Prods. v. Shoe World, Inc.,
806 F.2d 392 (2d Cir. 1986)....................12

Estee Lauder, Inc. v. Watsky,
323 F. Supp. 1064 (S.D.N.Y. 1970)....................19

Gayle Martz, Inc. v. Sherpa Pet Group, LLC,
651 F. Supp. 2d 72 (S.D.N.Y. 2009)....................18

GMA Accessories, Inc. v. BOP, LLC,
765 F. Supp. 2d 457 (S.D.N.Y. 2011), *aff'd sub nom GMA Accessories, Inc. v. Elec. Wonderland, Inc.*, 558 F. App'x 116 (2d Cir. 2014) 15

Gund, Inc. v. Golden Bear Co., Ltd.,
92 CIV. 8555 (LJF), 1992 WL 392602 (S.D.N.Y. Dec. 10, 1992)....................20, 21

Heisman Trophy Trust v. Smack Apparel Co.,
595 F. Supp. 2d 320 (S.D.N.Y. 2009)....................11, 22

Hermes Int'l v. Lederer de Paris Fifth Ave., Inc.,
219 F.3d 104 (2d Cir. 2000)....................18

Intl. Bus. Machines Corp. v. Papermaster,
08-CV-9078(KMK), 2008 WL 4974508 (S.D.N.Y. Nov. 21, 2008)....................25

Koon Chun Hing Kee Soy & Sauce Factory, Ltd. v. Kun Fung USA Trading,
No. 07CV2568(CPS), 2007 WL 2295811 (E.D.N.Y. Aug. 6, 2007) 19

Lancaster Fine Foods, Inc. v. Dalmatia Import Group, Inc.,
No. 5:15-cv-182 (E.D. Pa.) 6

Lancome Parfums et Beaute & Cie v. L B Int'l Corp.,
No. 86 Civ. 7750, 1986 U.S. Dist. LEXIS 17701 (S.D.N.Y. Nov. 14, 1986) 12

Lane Capital Management, Inc. v. Lane Capital Management, Inc.,
192 F.3d 337 (2d Cir. 1999)....................11

Microban Prods. Co. v. API Indus., Inc.,
No. 14 Civ. 41, 2014 U.S. Dist. LEXIS 63883 (S.D.N.Y. May 8, 2014)....................16, 17

Microban Prods. Co. v. iSkin, Inc.,
No. 14cv5980, 2016 U.S. Dist. LEXIS 24119 (S.D.N.Y. Feb. 23, 2016) 16

Multi-Local Media Corp. v. 800 Yellow Book, Inc.,
813 F. Supp. 199 (E.D.N.Y. 1993) 10

MyPlayCity, Inc. v. Conduit, Ltd.,
No. 10 Civ. 1615, 2012 U.S Dist. LEXIS 47313 (S.D.N.Y. Mar. 30, 2012)....................12, 13

N. A. Operating Co., Inc. v. Evergreen Distributors, LLC,
293 F.R.D. 363 (E.D.N.Y. 2013)....................24

N.Y.C. Triathlon v. NYC Triathlon Club, Inc.,
704 F. Supp. 2d 305 (S.D.N.Y. 2010)....................22

New York State Elec. & Gas Corp., 697 F. Supp. 2d at 436....................13, 14

Nikon, Inc. v. Ikon Corp.,
No. 89 CIV. 6044(KMW)(NG), 1992 WL 398440 (S.D.N.Y. Dec. 18, 1992)
aff'd, 987 F.2d 91 (2d Cir. 1993)....................22

NYP Holdings v. N.Y. Post Pub'g Inc.,
63 F. Supp. 3d 328, 341 (S.D.N.Y. 2014)....................17

Omega, S.A. v. S & N Jewelry Inc.,
No. 92 Civ. 3656 (PKL), 1992 U.S. Dist. LEXIS 8359 (S.D.N.Y. June 8, 1992) 14

Perfect Fit Indus., Inc. v. Acme Quilting Co.,
Inc., 646 F.2d 800 (2d Cir. 1981) 20

Polaroid Corp. v. Polarad Electronics Corp.,
287 F.2d 492 (2d Cir. 1961)....................13, 15

Pretty Girl, Inc. v. Pretty Girl Fashions, Inc.,
778 F. Supp. 2d 261 (E.D.N.Y. 2011) 10

Resolute Partners, LLC v. BaseCom Const., Inc.,
3:12 CV 1291 JBA, 2013 WL 6118212 (D. Conn. Nov. 20, 2013) 25

Salinger v. Colting,
607 F.3d 68 (2d Cir. 2010)....................10

Standard Investment Chartered, Inc. v. NASD, Inc.,
07 Civ. 2014 (SWK), 2007 U.S. Dist. LEXIS 27342 (S.D.N.Y. April 1l, 2007)....................24

Star Indus., Inc. v. Bacardi & Co. Ltd.,
412 F.3d 373 (2d Cir. 2005)....................14, 21

Tecnimed SRL v. Kidz-Med, Inc.,
763 F. Supp. 2d 395 (S.D.N.Y. 2011) *aff'd*, 462 Fed. Appx. 31 (2d Cir. 2012)..........20, 21, 22

Twentieth Century Fox Film Corp. v. Mow Trading Corp,
749 F. Supp. 473 (S.D.N.Y. 1990)....................23, 24

Warner Bros., Inc. v. Gay Toys, Inc.,
658 F.2d 76 (2d Cir. 1981)....................14

Warner-Lambert v. Northside Develop. Corp.,
86 F.3d 3 (2d Cir. 1996)....................17

Westinghouse Elec. Corp. v. Gen. Circuit Breaker & Elec. Supply, Inc.,
106 F.3d 894 (9th Cir. 2007) 15

Zino Davidoff SA v. CVS Corp.,
571 F.3d 238 (2d Cir. 2009)....................11, 16

Statutes

15 U.S.C. § 1116(d) 15, 16

Rules

FED. R. CIV. P. 26(d) 23

Fed. R. Civ. P. 65(c) 22

INTRODUCTION

This case began as a trade secret, unfair competition and contracts case by Plaintiff Dalmatia Import Group, Inc. ("Dalmatia") against its former distributor, Defendant FoodMatch, Inc. ("FoodMatch"). After it moved for a preliminary injunction against FoodMatch, Dalmatia established with certainty that its original claims did not even scratch the surface of FoodMatch's wrongdoing. **Dalmatia has discovered unlawful conduct wholly independent of the issues that have previously been before this Court.** *Leaving aside everything related to the competing Divina fig spreads that is the subject of Dalmatia's pending trade secret misappropriation claims*, FoodMatch and Dalmatia's contract manufacturer, Defendant Lancaster Fine Foods, Inc. ("Lancaster"), have been stealing from Dalmatia by selling *counterfeit Dalmatia product* using Dalmatia's trademarks without Dalmatia's knowledge or permission. Lancaster and FoodMatch are violating the Lanham Act's prohibitions against trademark infringement and counterfeiting to Dalmatia's immediate and irreparable detriment. Dalmatia requests the Court's intervention to stop these illegal practices, to seize the counterfeit product and means of counterfeiting, and to recall the counterfeit product that is currently flooding the market.

Defendants' counterfeiting scheme is simple to understand. Under the parties' agreements and longstanding practices, Lancaster produced fig spread pursuant to Dalmatia's formula and specifications for sale to Dalmatia. Dalmatia, in turn, sold the products to FoodMatch, which distributed them to other wholesalers and retailers nationwide. In 2015, however, the relationship between Lancaster and Dalmatia soured, and the misconduct began. Dalmatia rejected certain batches due to product quality problems, telling Lancaster it was not authorized to sell those batches as Dalmatia product. Lancaster sold those unauthorized batches anyway, *directly to FoodMatch*, in Dalmatia's packaging. Lancaster also created entirely new batches in Dalmatia's packaging without Dalmatia's knowledge, and it sold those batches directly to FoodMatch too. FoodMatch knew the products were unauthorized because it purchased them directly from Lancaster, cutting Dalmatia entirely out of the loop. FoodMatch then sold the counterfeit product to its retail customers.

Through sheer circumstance, FoodMatch and Lancaster have been caught red-handed. In numerous retail stores and distributors, from California to Massachusetts, Dalmatia employees found dozens and dozens of jars identical in all respects to Dalmatia's fig spread with "best by" dates and lot coding corresponding to manufacturing dates for which Dalmatia either had expressly rejected all batches or had not authorized any production. Upon further investigation, Dalmatia found jars with no "best by" dates at all. Dispositively, *Dalmatia never was charged by Lancaster, and never paid Lancaster, for the products at issue. And Dalmatia never charged FoodMatch for that product, and FoodMatch never paid Dalmatia for it.* Dalmatia had no idea the rejected and unapproved product was being sold under its name and its marks and likely would never have known had it not stumbled upon the counterfeit product in the grocery store.

The serious financial penalties for counterfeiting and trademark infringement will not remedy the irreparable harm that is befalling Dalmatia *right now* in the marketplace. The thousands of jars of fig spread being sold at retailers across the country under Dalmatia's marks *right now* were rejected and unauthorized because of quality problems that would have tarnished Dalmatia's brand. Day-by-day, jar-by-jar, customers who buy this counterfeit product may become lost customers, which is precisely why Dalmatia prohibited Lancaster from selling them. The irreparable harm to Dalmatia is readily apparent should be stopped immediately.

STATEMENT OF FACTS

I. DALMATIA DEVELOPED AND PROTECTED ITS RENOWNED FIG SPREAD.

Almost two decades ago, Dalmatia began to sell fig spread under the trademark DALMATIA, the name of a region in Croatia which Dalmatia's founders dearly love. *Magee Decl.* ¶ 4. For years, Dalmatia worked tirelessly to develop a product that was worthy of the DALMATIA name—a fig spread with flavor complexities, uniquely smooth texture, and above all, of a consistent high-quality. *Id.* ¶ 5. Dalmatia's DALMATIA-branded fig spread was instantly successful, winning industry awards and garnering substantial sales. *Id.* ¶ 6.

To protect its brand, Dalmatia secured federal trademark registrations. Dalmatia owns an incontestable federal registration for DALMATIA for "dried fig spread." *Magee Decl.* ¶ 7 & Ex. A (Reg. No. 2,918,383). Dalmatia also owns an incontestable federal registration for the jar configuration in which the product is sold. Ex. B (Reg. No. 3,667,176). The federally registered mark and protected configuration are shown below (*id.* ¶ 8):

DALMATIA®
FIG SPREAD
ORIGINAL

II. DALMATIA SELECTED FOODMATCH AS ITS DISTRIBUTOR.

Because of the success of Plaintiff's DALMATIA fig spread, Dalmatia sought to expand production and distribution of the product. *Magee Decl.* ¶ 9. Dalmatia selected FoodMatch as its exclusive distributor in the United States. *Id.* On December 22, 2006, Dalmatia and FoodMatch entered into a Distribution Agreement. *Id.* & Ex. C. Paragraph 7(b) of the Agreement grants FoodMatch "a limited, revocable license within the [United States] during the term of this Agreement for ancillary use of the [DALMATIA Marks] as pre-approved by Dalmatia in writing in connection with any sales, marketing, and distribution activities of FoodMatch with respect to the Products." Ex. C at 5. FoodMatch agreed not to "perform any act which would be inconsistent with any of Dalmatia's Marks or Intellectual Property or Dalmatia's ownership thereof." *Id.* at 5 ¶ 7(c). Pursuant to the Agreement, FoodMatch purchased DALMATIA fig spread directly from Dalmatia and sold it to retailers and sub-distributors throughout the United States. *Magee Decl.* ¶ 10.

III. DALMATIA DISCOVERED QUALITY PROBLEMS IN BATCHES OF FIG SPREAD MANUFACTURED BY LANCASTER.

As is common in the specialty foods industry, Dalmatia does not manufacture its products by itself. Instead, Dalmatia contracted with Lancaster to manufacture, package and label its DALMATIA fig spread according to Dalmatia's quality standards. *Magee Decl.* ¶ 11. At all relevant times, Lancaster manufactured, packaged, and labelled Plaintiff's DALMATIA-branded fig spread and sold it to Dalmatia, which sold it to FoodMatch for national distribution. *Id.* ¶ 12.

Dalmatia continuously ensured that the DALMATIA products Lancaster manufactured, packaged and labelled met Dalmatia's quality standards. *Id.* ¶ 13. Lancaster sent product samples to Dalmatia for Dalmatia's review and approval. *Id.* ¶ 13. Additionally, Dalmatia's owners and employees regularly purchased DALMATIA fig spread from various stores and sampled those products to assess quality. *Id.* If a product sample did not conform to Dalmatia's standards, Dalmatia objected to Lancaster and the issues were addressed. *Id.*

In April 2015, Dalmatia began to learn of significant quality issues with the fig spread manufactured by Lancaster. *Magee Decl.* ¶ 14. Dalmatia found inedible fig stems across multiple batch samples, fluctuations in sweetness and acidity levels, and problems with viscosity. *Id.* Dalmatia also received a consumer complaint of a rock in a jar of the DALMATIA fig spread. *Id.* Dalmatia instructed Lancaster to send samples from each production batch for Dalmatia's review and approval before the batches could be released. *Id.* ¶ 15; *Ex. D.*

From April through September 2015, Dalmatia tested representative production samples sent by Lancaster after each production run. *Magee Decl.* ¶ 16. Dalmatia approved some production batches but rejected others. *Id.* When product samples did not meet Dalmatia's standards, Dalmatia informed Lancaster of the specific issues that needed to be addressed, such as product separation, unacceptable hardness of fig pieces, and problems with viscosity. *Id.*

IV. DALMATIA REJECTED CERTAIN BATCHES PRODUCED BY LANCASTER AND ULTIMATELY HALTED LANCASTER'S PRODUCTION ENTIRELY.

In early November 2015, Dalmatia tested samples of fig spread that Lancaster had manufactured on October 26 and 27 and found that they did not meet Dalmatia's quality standards. *Magee Decl.* ¶ 17. Dalmatia notified Lancaster that it rejected all production batches dated October 26 and 27 and instructed Lancaster to halt all manufacturing of fig spread. *Id.*; *Sanlley Decl.* ¶ 5. Dalmatia also demanded that Lancaster return the labels and tags for DALMATIA fig spread. *Id.* ¶ 6; *Magee Decl.* ¶ 17. The last production batches approved by Dalmatia were manufactured by Lancaster on October 23, 2015. *Magee Decl.* ¶ 17. The last shipment from Lancaster containing any fig spread approved by Dalmatia was on November 3, 2015. *Sanlley Decl.* ¶ 8; *Ex. E.*

In response to Dalmatia's rejection of all production batches from October 26 and 27 and instruction to halt production, Lancaster wrote to Dalmatia on November 9, stating that it had "3.5 truckloads of [DALMATIA] product ready for immediate shipment," which had been produced on October 26, 27, 28 and 29 to fulfill three open purchase orders and requested payment and shipping instructions for those products. *Magee Decl.* ¶ 18 & *Ex. F.* Lancaster also stated that it would not fulfill five other open purchase orders unless Dalmatia reconfirmed those orders. *Id.*

Dalmatia continued its objection to the October 26 and 27 production batches (which would have comprised a significant proportion of the "3.5 truckloads of DALMATIA products ready for immediate shipment") because they failed to meet Plaintiff's quality standards, refused to confirm the other five purchase orders and stated that Lancaster had "no right to deliberately disregard [Plaintiff's] quality control instructions" and must "cease production of any other product, as you have been advised, since [Lancaster] refuses to adhere to Dalmatia's quality control standards." *Magee Decl.* ¶ 19; *Ex. G*. Dalmatia also reiterated its demand that Lancaster return the means by which Lancaster produced DALMATIA fig spread, including all jars and labels. *Id.* Lancaster ignored this request for reasons which later are obvious. *See infra* p. 7-9.[1]

V. DALMATIA NOTIFIED FOODMATCH THAT LANCASTER'S INVENTORY HAD BEEN REJECTED.

In early November, FoodMatch personnel saw "truckloads" of DALMATIA fig spread at Lancaster's facility. *Sanlley Decl.* ¶ 10; *Ex. I.* FoodMatch requested Dalmatia to authorize Lancaster to release those products to FoodMatch. *Id.* Dalmatia responded that those products not been approved by quality control and that FoodMatch could not pick up those products for distribution. *Id.*

On November 9, 2015, Dalmatia informed FoodMatch that Dalmatia was moving production of its fig spread from Lancaster to Plaintiff's facility in Croatia due to "quality

[1]While retaining the means to produce counterfeit DALMATIA product, Lancaster sued Dalmatia for breach of contract in Pennsylvania seeking money damages. Lancaster alleged that Dalmatia had improperly cancelled (i) the three purchase orders for DALMATIA fig spread which Lancaster purportedly fulfilled with the (rejected) production batches of October 26 and 27 and (ii) the five open purchase orders for DALMATIA fig spread. *Ex. H* at 6-7 (Count II) & Ex. F thereto). Dalmatia removed that case to the United States District Court for the Eastern District of Pennsylvania, where its responsive pleading is not yet due. *See Lancaster Fine Foods, Inc. v. Dalmatia Import Group, Inc.,* No. 5:15-cv-182 (E.D. Pa.).)

control issues that proved to be irremediable." *Magee Decl.* ¶ 20; *Ex. J.* In response, FoodMatch acknowledged that Dalmatia had rejected the "truckloads" of DALMATIA fig spread at the Lancaster facility because of quality issues, but renewed its request that Dalmatia nevertheless allow Lancaster to release those products to FoodMatch for sale. *Magee Decl.* ¶ 21; *Ex. K.* Dalmatia responded that it "would not stand for sub-standard product being released under [the DALMATIA] brand" and that Lancaster was "incapable of maintaining quality and safety standards." *Magee Decl.* ¶ 22; *Ex. L.* Dalmatia informed FoodMatch that fig spread was being rush-shipped from Plaintiff's Croatia facility to meet FoodMatch's needs, but that it could not allow the sale of truckloads of Lancaster's substandard DALMATIA products. *Id.*

VI. LANCASTER SOLD REJECTED AND UNAUTHORIZED DALMATIA PRODUCTS DIRECTLY TO FOODMATCH, WHICH SOLD THOSE COUNTERFEIT PRODUCTS TO WHOLESALERS AND RETAILERS.

Despite Dalmatia's repeated rejection of all of Lancaster's October 26 and 27 DALMATIA fig spread production batches based on quality issues, Lancaster nevertheless sold those products to FoodMatch who in turn sold them to retailers and distributors, all without Plaintiff's knowledge. Specifically, dozens of jars of what purport to be DALMATIA fig spread with "best by" dates of October 26 and 27, 2018 are **currently** being sold by retailers throughout the United States. *Magee Decl.* ¶ 23. Dalmatia recently discovered those jars in retail stores.[2] *Sanlley Decl.* ¶¶ 12-13, 16-18, 19, 21; *Stevens Decl.* ¶¶ 8, 9. Those jars were necessarily produced on October 26 and 27, 2015, because Lancaster's coding system assigns a "best by" date exactly three years after the production date.[3] *Sanlley Decl.* ¶ 9.

[2] Indeed, the undersigned counsel for Dalmatia purchased a jar of DALMATIA fig spread with a "best by" date of October 27, 2018, in Kings supermarket in Bedminster, New Jersey.

[3] The jars also bear lot codes using Lancaster's Julian date system. For example, production batches manufactured on October 27, 2015, are coded in part "5300-DI" with the "5" standing for the year 2015 and "300" referring to the 300th day of the year (October 27). *See Sanlley Decl.* ¶ 9.

Retailers also are selling numerous jars of purported DALMATIA fig spread with "best by" dates of November 13 and 16, 2018. Dalmatia found dozens of these jars in large grocery stores across the country; indeed, Dalmatia found several *cases* of counterfeit product at a distributor. *Sanlley Decl.* ¶¶ 12, 14-17, 20-21; *Stevens Decl.* ¶¶ 4-5, 7-9. Those jars were produced by Lancaster on November 13 and 16, 2015, **after** Dalmatia expressly and in writing instructed Lancaster to stop manufacturing DALMATIA fig spread and **after** Lancaster indicated its agreement to do so. *Magee Decl.* ¶¶ 17-19, 23; *Sanlley Decl.* ¶ 5.

Further, retailers are selling jars of purported DALMATIA fig spread with *no "best by" dates at all*. *Sanlley Decl.* ¶ 19; *Stevens Decl.* ¶ 6. Because there are "no best" by dates, it cannot be ascertained *when* those jars were produced. But Dalmatia never approved a fig spread lacking a "best by" date or production code.[4] *Magee Decl.* ¶ 24.

There are only two possible sources of these counterfeit products: Lancaster and FoodMatch. And the motive for Lancaster's sustained refusal to return the means for producing DALMATIA products to Dalmatia is crystal clear – to manufacture DALMATIA products and sell those counterfeit products to FoodMatch, which then resold them to retailers and sub-distributors, all without Plaintiff's knowledge and in effort to destroy Plaintiff's brand. Labels on cases of counterfeit product state the product was packed for FoodMatch, and retailers of the counterfeit products state they bought them from FoodMatch or a subdistributor. *Sanlley Decl.* ¶¶ 15-16, 18-22. FoodMatch was Dalmatia's exclusive distributor for all of 2015, and Lancaster was the exclusive manufacturer of jars of Dalmatia's fig spread until November 9, 2015. *Magee Decl.* ¶¶ 9, 12.

[4]Without a "best by" date, there is no way to effectuate a safety recall of the product. No responsible manufacturer would produce, nor would any responsible brand owner authorize, a widely-distributed food product that lacked a "best by" date and thus which could not be effectively recalled.

FoodMatch's and Lancaster's scheme to sell counterfeit DALMATIA fig spread was necessarily well known to Defendants Michael Thompson and Philip Meldrum, the Presidents of Lancaster and FoodMatch, respectively, as well as numerous employees within both companies, owing to this simple fact: The normal chain of production and distribution was that Lancaster manufactured the product and sold it to Dalmatia, which then sold it to FoodMatch for distribution. *Sanlley Decl.* ¶ 7. For the *counterfeit* products at issue here—the products that Dalmatia expressly rejected and the products manufactured after the instruction to cease all production—Lancaster sold the product directly to FoodMatch (or to an unknown party). Dalmatia was cut out of the loop. Lancaster did not invoice Dalmatia for these products, and Dalmatia never paid for these products, let alone approved them. *Sanlley Decl.* ¶ 12. Likewise, Dalmatia never invoiced or received payment from FoodMatch for these products, because Dalmatia had no idea that these sales—supposedly of *its* products—were occurring. *Id.*

VII. DALMATIA IS SUFFERING IMMENSE IRREPARABLE INJURY.

FoodMatch and Lancaster have sold and distributed *at least* **90,636 jars of counterfeit DALMATIA fig spread**. *Magee Decl.* ¶ 25; *Sanlley Decl.* ¶ 9; *Ex. M.* By flooding distributors and retailers across the country with tens of thousands of counterfeit products and suppressing demand, FoodMatch bought itself time to launch and establish a market for its competing Divina fig spread.[5] At the same time, by manufacturing and selling inferior, knock-off products, Defendants sought to utterly destroy the goodwill and reputation of Dalmatia's brand and product—a product that FoodMatch itself described as the "most popular fig spread on the

[5] In his affidavit submitted in opposition to Dalmatia's earlier motion for preliminary injunction, Defendant Mr. Meldrum, FoodMatch's CEO, hypothesized that Dalmatia's decrease in sales at the beginning of 2016 was "the result of any number of factors, e.g. customers stocked up on inventory before the year end for the holidays, customers stocked up on inventory before the year end change in distribution, ..." Dkt. No. 15 ¶ 10. In fact, FoodMatch ensured that customers fully stocked up on inventory before year end by selling them counterfeit DALMATIA products.

market." *Magee Decl.* ¶ 26; Ex. N. Destruction of Dalmatia's sterling reputation provides Defendants an opportunity to sell their competitive fig spread to buyers who are dissatisfied with the inferior DALMATIA counterfeit products. *Magee Decl.* ¶ 26. Defendants' counterfeiting is not only profitable in and of itself; it also paved the way for Defendants to steal sales and customers from Dalmatia for FoodMatch's competitive Davina product. *Magee Decl.* ¶ 25. Distributors, retailers and consumers across the country are purchasing substandard DALMATIA products that they falsely believe are approved by Dalmatia. Given the three-year shelf life of the product, the counterfeit product, numbering in the thousands of jars, could damage DALMATIA's reputation for years to come—day-by-day, jar-by-jar—unless it is removed.

Dalmatia has spent the better part of two decades carefully cultivating the reputation associated with its DALMATIA fig spread. Dalmatia has now lost control over that reputation—or more precisely, control was stolen by FoodMatch and Lancaster. *Magee Decl.* ¶ 27.

ARGUMENT

I. PRELIMINARY INJUNCTION STANDARD

To obtain a preliminary injunction, Plaintiff proves (1) a likelihood of success on the merits; (2) it is likely to suffer irreparable injury in the absence of an injunction; (3) the balance of hardships tips in Plaintiff's favor; and (4) the public interest would not be disserved by entry of a preliminary injunction. *Salinger v. Colting*, 607 F.3d 68, 74-75 (2d Cir. 2010); *Pretty Girl, Inc. v. Pretty Girl Fashions, Inc.*, 778 F. Supp. 2d 261, 265 (E.D.N.Y. 2011) (granting preliminary injunction in trademark case). "Federal courts have long recognized the need for immediate injunctive relief in trademark infringement cases due to the amorphous nature of the damage to the trademark and the resulting difficulty in proving monetary damages." *Multi-Local Media Corp. v. 800 Yellow Book, Inc.*, 813 F. Supp. 199, 202 (E.D.N.Y. 1993). Thus, courts routinely grant preliminary injunctions in trademark infringement and counterfeiting cases. *See, e.g.*, *Zino Davidoff SA v. CVS Corp.*, 571 F.3d 238, 247 (2d Cir. 2009)

II. DEFENDANTS ARE INFRINGING DALMATIA'S TRADEMARKS.

To prevail on its trademark infringement claims, Plaintiff must show that (1) it owns valid trademarks for DALMATIA and its fig spread jar configuration, and (2) that Defendant's unauthorized use of the DALMATIA trademark and jar configuration is likely to cause confusion as to the source or origin of Defendants' fig spread products. *See, e.g., Arrow Fastener v. Stanley Works*, 59 F.3d 384, 390 (2d Cir. 1995). Plaintiff has established both elements.

A. Plaintiff owns valid marks for DALMATIA and its jar configuration.

Plaintiff owns incontestable trademark registrations for DALMATIA and its jar configuration both for fig spreads. *Magee Decl.* ¶¶ 7 & 8; Exs. A & B. Those registrations are "conclusive evidence" of the validity of the DALMATIA and jar configuration marks, of the registration of those marks, of Plaintiff's exclusive ownership of those marks, and of Plaintiff's "exclusive right to use" those marks in commerce for fig spreads. *See, e.g., Lane Capital Management, Inc. v. Lane Capital Management, Inc.*, 192 F.3d 337, 345 (2d Cir. 1999). Thus, Plaintiff has satisfied the first required element for trademark infringement. *See, e.g.*, *Heisman Trophy Trust v. Smack Apparel Co.*, 595 F. Supp. 2d 320, 326 (S.D.N.Y. 2009) (granting preliminary injunction—plaintiff's federal registrations establish trademark validity).

B. Defendants' unauthorized use of Plaintiff's DALMATIA marks causes a likelihood of confusion.

Defendants' unauthorized manufacture, distribution and sale of DALMATIA fig spread are likely to cause confusion. "The public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement." *Dallas Cowboys*

Cheerleaders, Inc., v. Pussycat Cinema, Ltd., 604 F.22d 200, 205 (2d Cir. 1979). As a matter of law, unauthorized sales by a licensee of products bearing a licensor's mark cause a likelihood of confusion. *E.g.*, *MyPlayCity, Inc. v. Conduit, Ltd.*, No. 10 Civ. 1615, 2012 U.S Dist. LEXIS 47313, at *56-57 (S.D.N.Y. Mar. 30, 2012).

Here, Defendants have engaged in the unauthorized use of Plaintiff's DALMATIA marks by, at a minimum: (1) distributing and selling thousands of jars of DALMATIA fig spread produced on October 26 and 27 that was rejected by Plaintiff because of poor quality, (2) manufacturing, distributing, and selling DALMATIA fig spread produced on November 13 and 16, (3) and distributing and selling DALMATIA fig spread without production codes or "best by" dates, all without Plaintiff's knowledge or approval.

"One of the most valuable and important legal protections afforded by the Lanham Act is the right to control the quality of the goods manufactured and sold under the holder's trademark." *El Greco Leather Prods. v. Shoe World, Inc.*, 806 F.2d 392, 395 (2d Cir. 1986) (reversing with instruction to enter a permanent injunction to licensor). "For this purpose the actual quality of the good is irrelevant; **it is the control of quality that a trademark holder is entitled to maintain**." *Id.* (emphasis added). "The mere act of ordering a product . . . does not deprive its holder of the right to control the product and the trademark." *Id.*

Lancaster and FoodMatch manufactured, distributed and sold at least nearly 100,000 thousand jars of rejected or unauthorized DALMATIA fig spread. That unauthorized use constitutes trademark infringement as a matter of law. "Likelihood of confusion is inherent in the infringement itself because the consumer is likely to be misled into believing that the trademark owner . . . sponsored or approved [the rejected goods]." *Lancome Parfums et Beaute & Cie v. L B Int'l Corp.*, No. 86 Civ. 7750, 1986 U.S. Dist. LEXIS 17701 (S.D.N.Y. Nov. 14,

1986) (granting preliminary injunction – licensee sold 26,000 purses rejected by licensor for failure to meet quality standards).

Because Defendants have engaged in the unauthorized manufacturing, distribution and sale of DALMATIA fig spread, an analysis of the Second Circuit's *Polaroid* likelihood of confusion factors is unnecessary. *See, e.g.*, *MyPlayCity, Inc.*, 2012 U.S Dist. LEXIS 47313, at *56-57 (granting summary judgment to licensor – unauthorized use by an ex-licensee proves likelihood of confusion as a matter of law and analysis of *Polaroid* factors is "largely superfluous."). Out of an abundance of caution, Plaintiff briefly discusses those factors which show the likelihood of confusion here is overwhelming.

Likelihood of confusion is determined by: (1) strength of plaintiff's mark; (2) similarity of the parties' marks; (3) competitive proximity of the parties' goods; (4) the likelihood that plaintiff will "bridge the gap," if any, between the parties' goods; (5) actual confusion; (6) defendant's good faith; (7) the quality of defendant's goods; and (8) purchaser sophistication. *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, 495 (2d Cir. 1961). To obtain a preliminary injunction, Plaintiff is not required to prove all or even a majority of these factors. *See, e.g., New York State Elec. & Gas Corp.,* 697 F. Supp. 2d at 436 (granting preliminary injunction where two *Polaroid* factors favored a likelihood of confusion). Here, however, virtually all the *Polaroid* factors heavily favor Plaintiff.

First, Plaintiff's incontestable, federally-registered DALMATIA marks are strong. In nearly two decades, Plaintiff has earned tens of millions of dollars in revenues from the sale of its DALMATIA-branded products in its federally registered jar configuration. *Magee Decl.* ¶ 9. Plaintiff's DALMATIA fig spread, in Lancaster's own words, is the "best fig spread" in the United States. *Magee Decl.* ¶ 26; Ex. N. The strength of mark factor heavily favors Plaintiff.

See Bear USA v. A.J. Sheepskin & Leather Outerwear, 909 F. Supp. 896, 905 (S.D.N.Y. 1995) (granting preliminary injunction, finding plaintiff's mark strong where plaintiff had earned $1 million in sales during the previous year).

Second, Defendants' are using Plaintiff's DALMATIA mark and jar configuration to sell the unauthorized products. *Compare Magee* Decl. ¶8, *with Sanlley Decl.* ¶¶ 13-21 and *Stevens Decl.* ¶¶ 4-9. Thus, the similarity of marks' factors heavily favors Plaintiff.

Third, Defendants are selling fig spread identical to Dalmatia's product except that it does not satisfy Plaintiff's quality standards. Thus, the parties' products are the same and this factor heavily favors Plaintiff. *See Omega, S.A. v. S & N Jewelry Inc.*, No. 92 Civ. 3656 (PKL), 1992 U.S. Dist. LEXIS 8359, at *11-12 (S.D.N.Y. June 8, 1992) (granting preliminary injunction where parties sold "watches with a substantially similar appearance bearing an OMEGA mark").

Fourth, although bad faith is not required for entry of a preliminary injunction, *New York State Elec. & Gas Corp.*, 697 F. Supp. 2d 415, 428 (W.D.N.Y. 2010), Defendants here plainly acted in bad faith. Specifically, Defendants used Plaintiff's DALMATIA marks in connection with the manufacturing, distribution and sale of rejected and unauthorized batches of fig spread, knowing that Plaintiff did not approve such use and had rejected such use. Defendants engaged in this unauthorized use of Plaintiff's DALMATIA's marks to "sow confusion," *Star Indus., Inc. v. Bacardi & Co. Ltd.*, 412 F.3d 373, 388 (2d Cir. 2005), and lead consumers to believe that Plaintiff approved a product which was substandard. *See Warner Bros., Inc. v. Gay Toys, Inc.*, 658 F.2d 76, 79 (2d Cir. 1981) (confusion can be premised on likelihood that public believes defendant is distributing products vouched for by plaintiff).

Fifth, where, as here, Defendant is using Plaintiff's federally registered marks for the same product in Plaintiff's trademark registrations, courts presume the existence of actual confusion. *See, e.g., C=Holdings B.V. v. Asiaram Corp.*, 992 F. Supp. 2d 223, 241 (S.D.N.Y. July 19, 2012) ("consumer confusion presumed" where licensee used licensed mark to sell products without licensor's consent). Thus, this factor favors Plaintiff. In any event, actual confusion is not required for a preliminary injunction. *See, e.g., Beharry & Co.*, 2006 U.S. Dist. LEXIS 79332, at *5-7 (E.D.N.Y. Oct. 31, 2006) (granting preliminary injunction in counterfeiting case without evidence of actual confusion).

As shown above, an analysis of the *Polaroid* likelihood of confusion factors shows an overwhelming likelihood of confusion. Given Plaintiff's ownership of incontestable, federally registered marks and an overwhelming likelihood of confusion, Plaintiff will very likely prevail.

III. FOODMATCH AND LANCASTER ARE COUNTERFEITING.

To prevail on its trademark counterfeiting claim, in addition to showing that it owns valid marks and a likelihood of confusion, as it has above, Plaintiff must also show that Defendants used a "spurious" and "identical" or "substantially indistinguishable" mark for the same goods identified in Plaintiff's registrations for its DALMATIA marks. *See* 15 U.S.C. § 1116(d). A "spurious" mark is "deceptive suggesting an erroneous origin; fake." *GMA Accessories, Inc. v. BOP, LLC*, 765 F. Supp. 2d 457, 472 (S.D.N.Y. 2011), *aff'd sub nom GMA Accessories, Inc. v. Elec. Wonderland, Inc.*, 558 F. App'x 116 (2d Cir. 2014). "A product is deemed counterfeit if it contains an original mark that is likely to deceive the public as to its origin." *Cartier v. Aaron Faber, Inc.*, 512 F. Supp. 2d 165, 169 (S.D.N.Y. 2007); *see Westinghouse Elec. Corp. v. Gen. Circuit Breaker & Elec. Supply, Inc.*, 106 F.3d 894, 900 (9th Cir. 2007) ("When an original mark is attached to a product in such a way to deceive the public, the product itself becomes a 'counterfeit' just as it would if an imitation of the mark were attached.").

Defendants manufactured, distributed and sold fig spread bearing Plaintiff's registered DALMATIA word mark and Plaintiff's registered jar configuration. Indeed, Defendants produced the counterfeit products using jars and labels supplied by Dalmatia. Thus, Defendants have engaged in the use of "counterfeit" marks under the Lanham Act, and Plaintiff is very likely to prevail on its claims. *See, e.g.*, *Microban Prods. Co. v. iSkin, Inc.*, No. 14cv5980, 2016 U.S. Dist. LEXIS 24119, at *9-10 (S.D.N.Y. Feb. 23, 2016) (granting judgment for licensor where licensee used licensor's federally registered marks for same goods in licensor's registration, such use is use of a "counterfeit" mark by definition under 15 U.S.C. § 1116(d), inherently causing confusion); *Microban Prods. Co. v. API Indus., Inc.*, No. 14 Civ. 41, 2014 U.S. Dist. LEXIS 63883, at *29 (S.D.N.Y. May 8, 2014) (same); *Century 21 Real Estate, LLC v. Raritan Bay Realty, Ltd.*, No. CV-07-1455, 2008 U.S. Dist. LEXIS 109507, at *24 n.4 (E.D.N.Y. July 24, 2008) ("[t]he defendants' use of the genuine Century 21 Marks after their rights as franchisees had expired . . . was therefore, by statutory definition, the use of counterfeit marks to the extent that they created the erroneous perception that Century 21 remained the source of the services provided.").

IV. PLAINTIFF IS SUFFERING IRREPARABLE INJURY.

"[O]ne of the most valuable and important protections afforded by the Lanham Act is the right to control the quality of the goods manufactured and sold under the holder's trademark." *Zino Davidoff SA v. CVS Corp.*, 571 F.3d 238, 243 (2d Cir. 2009) (affirming preliminary injunction). Trademark infringement and counterfeiting cause immediate, irreparable harm to a trademark owner, who cannot control the quality of its goods because "a higher incidence of substantial sales of counterfeit goods, which are invariably nonconforming and inferior" would "harm [Plaintiffs'] reputation and diminish the value of its trademark." *Id.* at 244. "In a licensor/licensee case the reasons for issuing a preliminary injunction are more compelling than in the ordinary case." *Church of Scientology Int'l v. The Elmira Mission of the Church of Scientology*, 794 F.2d 38, 42 (2d Cir. 1986) (reversing denial of preliminary injunction).

By manufacturing, distributing and selling unauthorized DALMATIA fig spread, Defendants have caused Plaintiff to lose control over the reputation, and "it is that loss of control which is the very thing that constitutes irreparable harm in the licensing context." *Id.* at 43. "The unauthorized use of a mark by a former licensee invariably threatens injury to the economic value of the goodwill and reputation associated with a licensor's mark." *Id.* at 43; *see also e.g., Byron Lars v. San Siro, Inc.*, No. 96b Civ. 9499, 1997 U.S. Dist. LEXIS 9398, at *26-27 (S.D.N.Y. May 19, 2007) (granting preliminary injunction to stop sale of unauthorized goods— "By selling goods bearing the Mark, despite the fact that Mr. Lars did not approve the goods, Defendant misleads ordinary consumers into believing that the merchandise constitutes genuine Byron Lars garments which were authorized by Byron Lars thereby resulting in irreparable injury.").

The loss of consumer goodwill caused by Defendants' manufacturing, distribution and sale of rejected or unapproved DALMATIA fig spread is unquantifiable and cannot be compensated by monetary damages alone. *See Warner-Lambert v. Northside Develop. Corp.*, 86 F.3d 3, 8 (2d Cir. 1996) (granting preliminary injunction where loss from non-conforming goods is unquantifiable). "Courts have consistently found irreparable harm to exist in situations where there is a likelihood of confusion between the marks, and where the reputation and goodwill cultivated by the party seeking the injunction would be out of the party's control because of the infringement." *Microban Prods. Co. v. API Indus., Inc.*, No. 14-CV-41 (KPF), 2014 U.S. Dist. LEXIS 63883, 2014 WL 1856471, at *21 (S.D.N.Y. May 8, 2014). That is because where "the party seeking the injunction shows that it will lose control over the reputation of its trademark . . . loss of control over one's reputation is neither calculable nor precisely compensable." *NYP Holdings v. N.Y. Post Pub'g Inc.*, 63 F. Supp. 3d 328, 341 (S.D.N.Y. 2014) (citation omitted). Plaintiff has proven Defendants' unauthorized use of its DALMATIA mark and jar configuration is causing irreparable harm.

V. THE BALANCE OF HARMS FAVORS A PRELIMINARY INJUNCTION.

Defendants engaged in the unauthorized manufacture, distribution and sale of DALMATIA products. The only hardship that Defendants will suffer through the imposition of a preliminary injunction is to comply with the law. *See Gayle Martz, Inc. v. Sherpa Pet Group, LLC*, 651 F. Supp. 2d 72, 85 (S.D.N.Y. 2009). Thus, any loss of business or harm to Defendants for being enjoined is not a cognizable injury. *See Corning Glass Works v. Jeannette Glass Co.*, 308 F. Supp. 1321, 1328 (S.D.N.Y. 1970) (granting preliminary injunction; although defendant may suffer loss of business if enjoined, "this is a loss [Defendants] may be justifiably be called upon to bear."). Moreover, the counterfeit DALMATIA products are but one of dozens of different products that are sold by Defendants. An injunction will not substantially damage their businesses or threaten their livelihood. The balance of hardships weighs in Plaintiff's favor.

VI. A PRELIMINARY INJUNCTION WOULD SERVE THE PUBLIC INTEREST.

Granting a preliminary injunction would protect Dalmatia, as well as the public. "Trademark laws exist to protect the public from confusion." *Hermes Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 107-08 (2d Cir. 2000). The interest in protecting the public from confusion is "especially served by issuing a preliminary injunction against a former licensee as the licensee's status increases the probability of consumer confusion." *Church of Scientology,* 794 F.2d at 42. "When [a once authorized party] loses its authorization yet continues to use the mark, the potential for consumer confusion is greater than in the case of a random infringer. Consumers have already associated some significant source identification with the licensor." *Id.* Indeed, "[i]t would be irresponsible for a court to permit [Defendant], whether in good faith or otherwise, to palm off spurious products on a credulous public. The community is entitled to receive for its money the product which it believes it is buying." *Estee Lauder, Inc. v. Watsky*, 323 F. Supp. 1064, 1067 (S.D.N.Y. 1970). The public interest strongly favors entry of a preliminary injunction.

VII. THE COURT SHOULD ORDER A SEIZURE OF, OR COMPEL DEFENDANTS TO DELIVER TO THE COURT OR DALMATIA, THE COUNTERFEIT GOODS AND MEANS OF COUNTERFEITING.

Dalmatia also seeks an order authorizing seizure of all counterfeit goods and means of counterfeiting from FoodMatch and Lancaster, or an order for Defendants to immediately deliver to the Court or Dalmatia those items to Dalmatia. Courts regularly grant seizure orders where plaintiff has proven a strong likelihood of success on its counterfeiting and trademark infringement claims. *See, e.g.*, *Chanel, Inc. v. Conklin Fashions, Inc.*, No. 3:15cv893, 2015 U.S. Dist. LEXIS 109886, at *3-4 (S.D.N.Y. Aug. 14, 2015) (granting seizure of means of making counterfeit products, including packaging equipment and machinery and packaging bearing counterfeit marks); *Koon Chun Hing Kee Soy & Sauce Factory, Ltd. v. Kun Fung USA Trading*, No. 07CV2568(CPS), 2007 WL 2295811, at *2 (E.D.N.Y. Aug. 6, 2007) (noting the court's prior grant of seizure order permitting seizure of counterfeit products and incriminating documents at defendants' warehouses).

A seizure order or order for Defendants to deliver the counterfeit goods and means of counterfeiting is appropriate here because Plaintiff has proven a strong likelihood of success on its trademark infringement and counterfeiting claims, and such an order is necessary to prevent further harm. Lancaster and FoodMatch may have counterfeit products still in their possession, and Lancaster has continuously refused to return Dalmatia's jars and labels because in Lancaster's view, it is Lancaster – not Dalmatia – that will decide when Lancaster is done manufacturing, distributing and selling DALMATIA products. Defendants have engaged in counterfeiting and have the means to continue to do so. The requested order is necessary to prevent further counterfeiting and preserve evidence of Defendants' conduct.

VIII. THE COURT SHOULD ORDER A RECALL OF COUNTERFEIT GOODS

Finally, Dalmatia seeks an order directing Defendants to recall at their own expense all counterfeit DALMATIA products that they sold, offering full refunds to customers who purchased Defendants' counterfeit products, and providing a copy of the Court's Preliminary Injunction Order to all customers that purchased Defendants' counterfeit products. This Court is empowered to issue a recall in cases like this, where a defendant has engaged in counterfeiting and infringement that causes irreparable harm to plaintiff's brand. *See Perfect Fit Indus., Inc. v. Acme Quilting Co.*, Inc., 646 F.2d 800, 807 (2d Cir. 1981) (affirming order of recall where defendant copied plaintiff's distinctive trade dress –"The recall procedure would naturally hasten the removal of the offending materials from public view and therefore seek to end quickly the injury to [plaintiff]."). "In deciding whether to order a recall, a court should consider the defendant's good faith or bad faith, the likelihood of diversion of customers from plaintiff to defendant, the extent of the burden entailed in a recall including the breadth of distribution and the shipping costs, and the probability that the plaintiff would benefit from such an order." *Tecnimed SRL v. Kidz-Med, Inc.*, 763 F. Supp. 2d 395, 414 (S.D.N.Y. 2011) *aff'd*, 462 Fed. Appx. 31 (2d Cir. 2012).

Here, these elements dictate a product recall. Lancaster and FoodMatch deliberately sold at a minimum, nearly 100,000 jars of counterfeit DALMATIA product. The likelihood of diversion of customers is extremely high because counterfeits of Dalmatia's well-known product are being sold to Dalmatia's customers. *See Cherry River Music Co. v. Simitar Ent., Inc.*, 38 F. Supp. 2d 310, 319 (S.D.N.Y. 1999) (awarding recall along with preliminary injunction where plaintiff was "adversely affected by a diversion of sales" to defendant); *Gund, Inc. v. Golden*

Bear Co., Ltd., 92 CIV. 8555 (LJF), 1992 WL 392602, at *5 (S.D.N.Y. Dec. 10, 1992) (same – recall where infringing goods were possessed by third party customer).

In balancing the burden of a recall on Defendants versus the benefit to Dalmatia, the Court must consider whether "the imposition of a recall may be unduly onerous, as where the defendant's products are widely distributed and particularly expensive to ship," or where "the probable benefit to the plaintiff from a recall may not outweigh the burden to the defendant," *Tecnimed*, 763 F. Supp. 2d at 415 (citing *Perfect Fit. Indus.*, 646 F.2d at 807). Here, the balance of burden and benefit heavily favors a recall.

The burden to FoodMatch and Lancaster in recalling the counterfeit DALMATIA products is slight. Though Plaintiff cannot know the full extent of Defendants' sale of counterfeit products, the products at issue are jars of fig spread – hardly a product that is burdensome or difficult to ship. *See Gund, Inc.*, 1992 WL 392602, at *5 ("[a]lthough the [infringing products] have been widely distributed, [the defendant] did not assert that they were particularly expensive to ship"). Indeed, courts have ordered recalls that cost defendant $10 million dollars, and that involved recalling product from 800 to 1,000 retailers. *See, e.g., Cherry River Music Co. v. Simitar Entm't, Inc.*, 38 F.Supp.2d 310, 322 (S.D.N.Y.1999). As the burden on Defendants will be proportionate to the extent of their counterfeiting, they can hardly complain about the expense of recalling these counterfeit goods. *See id.* (hardship in the recall was defendants' own making).

In contrast, the benefit to Dalmatia (and the public) from a recall is substantial. It will permit Dalmatia to regain control over the reputation of its DALMATIA products by taking faulty and unapproved products off the shelves and replacing them with genuine, high-quality stock. *Tecnimed*, 763 F. Supp. 2d at 416 (recall permitted plaintiff to sell its genuine products to consumers thus increasing sales). Moreover, unless recall is ordered, it could take years for the DALMATIA products to be sold off by retailers, as the products have a shelf life of three years. Under these circumstances, courts regularly issue product recalls. *See id.*; *Nikon, Inc. v. Ikon Corp.*, No. 89 CIV. 6044(KMW)(NG), 1992 WL 398440, at *2 (S.D.N.Y. Dec. 18, 1992) *aff'd,* 987 F.2d 91 (2d Cir. 1993).

IX. PLAINTIFF SHOULD NOT BE REQUIRED TO POST A BOND, OR, ALTERNATIVELY, ONLY A NOMINAL BOND.

For the Court to issue a preliminary injunction, Federal Rule of Civil Procedure 65(c) of states that the movant must "give security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). The Court has great discretion in determining what amount of bond is adequate, including ordering that no bond is required in cases where—as here—a plaintiff is highly likely to succeed on its claims. *Doctor's Assocs. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) (holding that district court did not abuse its discretion in dispensing with bond when issuing preliminary injunction because the amount of bond "rests within the sound discretion of the trial court"); *see, e.g.*, *N.Y.C. Triathlon v. NYC Triathlon Club, Inc.*, 704 F. Supp. 2d 305, 345 (S.D.N.Y. 2010) (denying defendant's request to require plaintiff to post bond to secure preliminary injunction where "the likelihood of success on the merits is overwhelming"); *Heisman Trophy Trust v. Smack Apparel Co.*, 595 F. Supp. 2d. 320, 329 (S.D.N.Y. 2009) (plaintiff not required to post a bond because of no likelihood of harm to defendant).

Plaintiff respectfully submits that no bond should be required to secure its requested preliminary injunction, given Defendants' blatant sale of counterfeit DALMATIA products and the overwhelming likelihood that Plaintiff will win its claims. *See American ORT, Inc. v. ORT Israel*, No. 07 Civ. 23321, 2009 U.S. Dist. LEXIS 10202, at *15-18 (S.D.N.Y. Jan. 21, 2009) (denying defendant's request for bond in Lanham Act case where defendant adduced only speculative evidence of harm).

X. THE COURT SHOULD ORDER EXPEDITED DISCOVERY.

Following the entry of a preliminary injunction, Dalmatia should be entitled to take expedited discovery to ensure that every batch of counterfeit DALMATIA fig spread product has been identified and properly recalled. Dalmatia knows with certainty and has established that the batches produced on October 26 and 27, 2015, and November 13 and 16, 2015, and all jars without a "best buy" date must be recalled. The preliminary injunction should so specify. The preliminary injunction should also generally require Dalmatia to recall any other counterfeit jars. But Dalmatia should also be permitted, through discovery, to determine *with specificity* what other counterfeit production batches are on the market and that must be recalled. The preliminary injunction can then be modified accordingly. This is the only way to ensure that all counterfeit products have been pulled from the market.

The Federal Rules of Civil Procedure authorize expedited discovery "in the interest of justice" upon a showing of "good cause." FED. R. CIV. P. 26(d). District courts have "broad power" to permit expedited discovery. *See Behnam Jewelry Corp. v. Aron Basha Corp.*, No. 97-CIV-3841, 1997 U.S. Dist. LEXIS 15957, at *58-*59 (S.D.N.Y. July 18, 1997) (granting expedited discovery to discover full nature of defendants' infringement). Expedited discovery is particularly appropriate and "routinely granted" in trademark infringement and counterfeiting cases because it often helps to identify and thus stop further irreparable harm to the trademark owner. *See, e.g.*, *id.* at 20; *Twentieth Century Fox Film Corp. v. Mow Trading Corp*, 749 F. Supp. 473, 475 (S.D.N.Y. 1990) (granting expedited discovery because inquiry may uncover continuing or future infringement, helping avoid continued irreparable harm).

Dalmatia may obtain expedited discovery by showing: (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery outweighs the injury that defendant will suffer if the expedited relief is granted. *Twentieth Century Fox*, 749 F. Supp. at 475.[6]

A. Dalmatia has shown likelihood of success on its trademark and counterfeiting claims and has demonstrated irreparable injury.

The first two elements mirror those for granting a preliminary injunction. Dalmatia has proven those two requirements. *See supra*.

B. Expedited discovery may prevent further irreparable harm.

Dalmatia seeks to serve expedited discovery on Defendants to identify the scope, nature and extent of infringement and counterfeiting and to locate additional infringing and counterfeit batches of product being sold. Dalmatia cannot identify **all** batches of counterfeit product that Defendants have released because it does not have access to Lancaster's and FoodMatch's production, sales, and shipping records. Plaintiff proposes to limited discovery requests to Defendants seeking those records to determine how many counterfeit batches were produced and where and when those batches were sold. *See* Exs. O-T. Obtaining that information will enable the recall of counterfeit products that damage Plaintiff's brand, and deceive consumers. *Magee Decl.* ¶ 28. *See N. A. Operating Co., Inc. v. Evergreen Distributors, LLC*, 293 F.R.D. 363, 370 (E.D.N.Y. 2013) (expedited discovery will permit plaintiff to "identify the sources and locations of counterfeit [products]" and provide plaintiffs with "information necessary to identify and stop

[6] Some courts in this district assess a request for expedited discovery under the standard of "reasonableness and good cause." *See Standard Investment Chartered, Inc. v. NASD, Inc.*, 07 Civ. 2014 (SWK), 2007 U.S. Dist. LEXIS 27342, at *16 (S.D.N.Y. April 11, 2007); *Ayyash v. Bank Al-Madina,* 233 F.R.D. 325 (S.D.N.Y. 2005). Because Plaintiff meets the four factor test, Plaintiff also meets the standard of "reasonableness and good cause."

continued unlawful activity.”). Further, even in cases where courts have granted preliminary injunctive relief, it has still authorized expedited discovery in the interest of a speedy resolution. *See Resolute Partners, LLC v. BaseCom Const., Inc.,* 3:12 CV 1291 JBA, 2013 WL 6118212, at *7 (D. Conn. Nov. 20, 2013); *Intl. Bus. Machines Corp. v. Papermaster*, 08-CV-9078(KMK), 2008 WL 4974508, at *1 (S.D.N.Y. Nov. 21, 2008) (expediting discovery “in consideration of the [p]arties’ equities”).

C. The harm to Dalmatia if expedited discovery is denied outweighs any harm to FoodMatch and Lancaster.

Any burden on Defendants to respond to Dalmatia’s expedited discovery is minor. Each of these requests would be served in the normal course of discovery . And Dalmatia’s requests are limited to issues of immediate importance to permit Dalmatia to identify all counterfeit production batches produced and sold by FoodMatch and Lancaster, and the identification of all customers who have been sent counterfeit DALMATIA products. *See* Ex. O-T. Such discovery is unlikely to be voluminous—unless Defendants have engaged in more counterfeit sales than Dalmatia is currently aware.

Conversely, Dalmatia will suffer greatly if expedited discovery is denied. Dalmatia only recently learned, by happenstance, of Defendants’ counterfeiting and trademark infringement. Dalmatia does not know the extent of Defendants’ scheme or the extent of irreparable harm to itself or the public. Dalmatia needs this information so that the irreparable harm can be fully identified and thus stopped, once and for all.

CONCLUSION

For the reasons set forth above and the facts set forth in the supporting exhibits and declarations, Plaintiff respectfully request that the Court grant its Motion for (1) Preliminary Injunction and (2) Expedited Discovery. A proposed order is submitted with this Motion.

March 25, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 25, 2016, the foregoing document was filed using the CM/ECF system, which will cause a copy to be electronically served on all counsel of record.

Additionally, the foregoing was served by email on counsel for the parties as follows:

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